

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 34495

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**BUCKINGHAM BRANCH RAILROAD CO.  
-Lease--  
CSX TRANSPORTATION, INC.**

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**MOTION OF THE  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
FOR DECLASSIFICATION OF BMWE EXHIBIT 4  
OR ALTERNATIVELY FOR LEAVE TO  
FILE SUPPLEMENTAL EVIDENCE**

Pursuant to the Board's Decision No. 1 in this proceeding, and paragraph 7 of the confidentiality order attached thereto, the Brotherhood of Maintenance of Way Employees ("BMWE") hereby requests that part of its exhibit no. 4, the May 10, 2002 memorandum from David Myers relating to FRA file CS 2002-68 (TS) be declassified so that it may be publicly filed, or alternatively that BMWE be granted leave to submit a supplemental filing in the form of a version of the same document that was obtained by BMWE under the Freedom of Information Act.

BMWE's comments in this proceeding included several Federal Railroad Administration documents that were produced by CSX Transportation in discovery that were marked confidential or highly confidential. BMWE requested that CSXT declassify these documents or some of them because documents of that type may be obtained from the FRA through FOIA processes. CSXT declined to declassify any of the documents. BMWE therefore filed both confidential and non-confidential versions of its comments and exhibits with the classified materials removed from the public versions. BMWE then filed a FOIA request with the FRA for

production of documents that would include documents that CSXT had produced but marked confidential. The FRA has now provided BMWWE with copies of certain materials that CSXT produced but marked as confidential, including the May 10, 2002 memorandum from David Myers relating to FRA file CS 2002-68 (TS) that was produced under seal as Exhibit 4 to BMWWE's confidential version of its comments. Attached hereto is a copy of the FRA's August 9 acknowledgment of receipt of BMWWE's request and the FRA's September 21, 2004 response to BMWWE's FOIA request showing that the FRA produced the May 10, 2002 memorandum. Since BMWWE has now obtained from the FRA a copy of the materials that were contained in its Exhibit 4, BMWWE now requests that the confidentiality classification for those materials now be lifted.

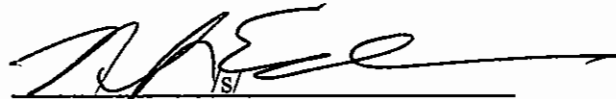
Alternatively, BMWWE requests that it be granted leave to file the attachment to this motion as supplemental evidence. BMWWE submits that it could not have filed these materials earlier because they were just produced by the FRA on September 21, 2004, well after the due date for BMWWE's comments. BMWWE submits that there will be no prejudice to the applicants because the same materials are already on record at the Board and applicants have already had the opportunity to respond to them. Moreover, the only reason that the FRA report could not be publicly filed is that CSXT classified the document as confidential even though it was a document that was otherwise publicly available. The only consequence of allowing the filing of the materials as supplemental evidence is that they would become part of the public record, and the applicants have no right to keep publicly available documents hidden from the public.

BMWWE previously requested that the May 10, 2002 memorandum from David Myers relating to FRA file CS 2002-68 (TS) be declassified or be permitted to be filed as supplemental evidence but BMWWE erroneously referred to the document as BMWWE's Exhibit 5. BMWWE

therefore files this motion in the event that its prior error in describing the document makes the a grant of its earlier motion problematic.

For the foregoing reasons, BMW requests that its motion be granted and that its exhibit no. 4 be declassified s or that BMW be permitted to file that document as supplemental evidence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RSE', is written over a horizontal line. A small 's' is visible below the signature.

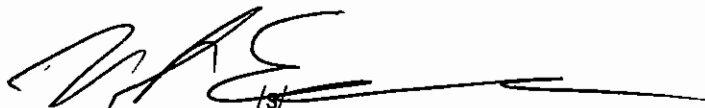
Richard S. Edelman  
O'Donnell, Schwartz & Anderson, P.C.  
1900 L Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 898-1824

Dated: October 7, 2004

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused copies of the foregoing Motion of the Brotherhood of Maintenance of Way Employees for Declassification of BMW Exhibit 4 or Alternatively for Leave to File Supplemental Evidence to be served by First Class Mail on all parties of record indicated on the attached service list and also by facsimile transmission to counsel for applicants and representatives of parties that filed comments.

Date: October 7, 2004

A handwritten signature in black ink, appearing to read 'RSE', followed by a horizontal line and a small 'ts' or similar mark.

Richard S. Edelman



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1120 Vermont Ave., N.W.  
Washington, D.C. 20590

8/9/2004

Mr. Richard S. Edelman  
Attorney  
O'Donnell Schwartz V. Anderson, P.C.  
1300 L Street, N.W. - Suite 1200  
Washington, DC 20005-4126

Re: FRA FOIA File No.: FOIA-04-426

Dear Mr. Edelman:

The Federal Railroad Administration (FRA) has received your letter requesting, pursuant to the Freedom of Information Act (FOIA), records concerning:

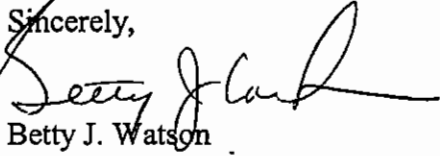
CSX Transportation's track & right of way on the line between mile post near Richmond, Virginia to milepost CA 276 near Clifton Forge, Virginia. Documents related to violations on the line and/or track safety standards regarding the line

We have assigned your request the FOIA number noted above and are initiating a search of the FRA's files for relevant records. The agency processes FOIA requests on a first in first out basis. After the search is completed, you will be informed in writing of the search results.

In order to expand the availability of FRA records to the public, the agency is providing public access to a number of agency records through the FRA Internet site. If you are interested in highway-rail grade crossing and accident information, railroad accident/incident reports or railroad employee injury/illness reports, you may be able to find the information more expeditiously through the FRA web site. The FRA Safety Data Internet site is found at <http://safetydata.fra.dot.gov/officeofsafety>. Simply click on about this site, select Query FRA Safety Databases or Crossing Inventory and Accident Histories, and follow the instructions. If you are able to fully satisfy your record needs through the FRA Internet site, I would appreciate it if you would let me know so I will be able to focus resources on other pending requests.

If you have any questions regarding FRA's FOIA process, please contact me at (202) 493-6065 or FRA's FOIA Officer, Lauren Price, at (202) 493-6039. I hope this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Betty J. Watson", with a stylized flourish extending from the end.

Betty J. Watson  
Administrative Staff Assistant



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1120 Vermont Ave., N.W.  
Washington, D.C. 20590

September 21, 2004

Mr. Robert Edelman  
O'Donnell, Schwartz & Anderson, P.C.  
1300 L Street N.W. - Suite 1200  
Washington, D.C. 20005-4126

Re: FRA FOIA File No. 04-426

Dear Mr. Edelman:

This letter is in response to your Freedom of Information Act (FOIA) request to the Federal Railroad Administration (FRA) for agency records related to CSX Transportation Inc. (CSX) track & right of way between Richmond and Clifton Forge, VA.

In accordance with the FOIA, I am enclosing the following related documents:

1. FRA civil penalty enforcement file CSX 2002-68 (TS) including:
  - July 18, 2002 letter to Patricia D. Barksdale.
  - summary of alleged violations.
  - May 10, 2002 memorandum from David R. Myers.
  - transmittal of violation report.
  - May 10, 2002 memorandum from Kirk Munro.
  - attachments as listed.
2. FRA civil penalty enforcement file CSX 2002-88 (TS) including:
  - September 27, 2002 letter to Patricia D. Barksdale.
  - summary of alleged violations.
  - transmittal of violation report.
  - July 31, 2002 memorandum from Kirk Munro.
  - attachments as listed.
3. Computer printout of FRA inspections for CSX in Virginia for 2000 and 2001.

Enforcement file CSX 2002-68(TS) was settled on September 30, 2003 for the amount of \$50,000. Enforcement file CSX 2002-88 (TS) was settled on September 30, 2003 for the amount of \$16,000.

The agency is withholding three pages from File CSX 2002-68 (TS) and three pages

from file CSX 2002-88 (TS) involving draft copies of the case control sheet, letter to CSX law department, and summary of alleged violations. These draft documents are being withheld on the basis of FOIA exemption 5 (5 U.S.C. 552(b)(5)) which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency." Specifically, these document are covered by the deliberative process privilege in that they reflect agency considerations in advance of a final determination.

No fee has been assessed for the enclosed documents in light of the minimal cost incurred in providing you with these records.

Since FRA has no other records in its possession that are responsive to your request, I am closing your file in this office. If you have any questions regarding the processing of your request, please contact FRA's FOIA Officer, Lauren Price at (202) 493-6039.

Sincerely,

A handwritten signature in cursive script, appearing to read "William R. Fashouer".

William R. Fashouer  
Assistant Chief Counsel

Enclosures